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SIXTEENTH ANNUAL MEETING
OF THE
AMERICAN SOCIETY OF INTERNATIONAL LAW
THE WASHINGTON HOTEL, WASHINGTON, D. C.
APRIL 27-29, 1922

FIRST SESSION

Thursday, April 27, 1922, 8.30 o'clock, p.m.

The Society was called to order at 8.30 o'clock, by the Honorable ELIHU ROOT, President.

The PRESIDENT. Ladies and gentlemen: During the first fifteen years of this Society it was the custom of the President to review the principal occurrences in the field of international law which had transpired during the preceding year, and to follow with a somewhat formal address. I confess myself unable to follow that process tonight. Events have been too tempestuous, and international affairs have been too largely outside of the field of international law. I shall proceed immediately, therefore, to some observations upon the part played by international law in the recent Conference for the Limitation of Armament in Washington.

INTERNATIONAL LAW AT THE ARMS CONFERENCE

ADDRESS BY ELIHU ROOT
President of the Society

The business of the recent Washington Conference on Limitation of Armament was to reach agreements which would bind the parties by contractual obligation, as distinguished from the obligations imposed by law. The agreements reached, whether expressed in treaties or in formal declarations, are not complicated and are easily understood. In two fields, however, the subjects treated were so far affected by rules of international law that to understand the full meaning and purpose of the provisions agreed upon, and the reasons why they received their present form, it seems desirable to consider the law in the light of which the agreements are to be read.

One of these fields is covered by the treaties and resolutions relating to China and the formal declarations relating to Siberia. The other field is covered by the treaty and resolutions regarding submarines and other new agencies of warfare.

In the first instance, let me state the general nature of the Conference work as a whole.

The Conference was called to deal with the limitation of armament. The special occasion for it was the apparent race of competition in the building of battleships and battle-cruisers on the part of Japan and the United States, a race in which Great Britain was about to enter under the imperative necessity of maintaining her ocean-borne food supply and protecting her Far Eastern colonies and dominions. The original parties proposed were the five great naval Powers, actual or potential,—Great Britain, France, Italy, Japan and the United States.

The condition of affairs in the continent of Europe made it plain very early that it would be impossible at that time and in that way to deal effectively with the subject of land armament, so that the work of the Conference was confined to its primary purpose of stopping the race of naval construction and limiting naval armament. At the outset of the Conference the United States made a very drastic proposal not only to stop competition, but to destroy about forty per cent. of the existing strength of capital ships of the principal naval Powers, in such a way as to leave the relative proportions of naval strength unchanged, and that proposal was ultimately accepted and embodied in the principal treaty resulting from the Conference.

Such proposals, however, do not carry themselves. Competition in armament results from national states of mind, distrust, apprehension of attack, a widespread belief that war is imminent, so that the peoples of the respective countries think in terms of war, prepare for war and reach a condition of thought and feeling in which it is natural for war to come. That state of mind must be disposed of if competition is to be really stopped. The nations concerned must cease to think in terms of war and must come to think in terms of peace. The object of having a conference is to effect such a change by friendly negotiation, explanation, doing away with misunderstanding, creating conviction of friendly intention and good faith, with the aid on appropriate occasions of friendly advice of third parties.

The success of such a process in the Washington Conference was registered in what is called the Four Power Treaty between Great Britain, France, Japan and the United States. I doubt if any formal treaty ever accomplished so much by doing so little. It provided that we should all respect rights, which we were bound to do already, and that if controversy arose about the Pacific islands (it was quite immaterial what islands), the parties should get together and talk it over, which was the very thing they were then doing in Washington. The consent of the Senate was not necessary to such an agreement. It merely arranged for following an ordinary form of diplomatic intercourse. The President had done the same thing at Algeciras and at The Hague and at the Conference of London without asking the consent of the Senate, and the Senate had ratified the conclu-

sions reached at those conferences. It was important, however, that the Senate should give its approval in this case because the instrument was a formal certificate to all the people of Japan and all the people of the United States and all the civilized Powers that the parties to the treaty had abandoned their mutual distrust and had ceased to think about war with each other and had resumed relations of genuine friendship. That certificate and the truth that it represents incidentally made possible the abandonment of the Anglo-Japanese Alliance and made possible the treaty for the limitation of naval armament and dispelled one war cloud upon the horizon of a troubled world.

The Four Power Treaty was not enough, however, standing by itself, to make the new condition stable without some treatment of the causes of irritation which had arisen and which might be apprehended upon the continent of Asia. For the discussion of this subject, four other Powers having interests in the Far East,—Belgium, China, The Netherlands and Portugal,—also took part.

These causes of irritation were incident to the contacts of western civilization with the peculiar and widely different civilization of China. The character of the Chinese people commands admiration, respect and sympathy. It was a product of the life of a self-contained agricultural community occupying a vast territory and content with the conditions of peace and industry within their own limits. It was little adapted, however, to resist the thrust of western enterprise ranging the world for trade and the development of wealth.

The report to the President by the American Delegation in the Conference described this aspect of Chinese civilization in these words:

The people of China are the inheritors of the oldest extant civilization of the world; but it is a civilization which has followed a course of development different from that of the West. It has almost wholly ignored the material, the mechanical, the scientific, and industrial mastery of natural resources, which has so characterized our Western civilization in its later growth, and has led among us to the creation of an intricate industrial system. The spirit of Chinese civilization has, moreover, been pacific, and lacking in the consciousness of nationality as we understand that term. . In its political aspects, the ideal of that civilization was to follow the principle of self-government by the family or guild to an extreme. The throne had imposed upon the people virtually no authority and exercised virtually no functions save to preserve order and to collect taxes for the maintenance of the throne as a symbol of national or racial unity.

* * * * *

China, with its age-long devotion to a political ideal which scarcely involved the concept of a state, and which had afforded its people no experience of coordinated action for political ends, was slower to adapt itself to conditions arising out of what it regarded as the intrusion of the West. Even after it had ceased actually to oppose this intrusion,

it still sought to hold itself aloof and to carry on a passive resistance to the new influences which were at work. Against powerful, well-knit governments of the European type, strongly nationalistic, and in some instances availing themselves of military force, China could oppose only the will of a weak and loose-knit government, lacking even the support of a national self-consciousness on the part of its people. Against the organized industrial and commercial enterprises of the West, China had no similar organization to oppose, and no means of exploiting on any adequate scale the coveted latent wealth of the country.

We should recall the fact that international law was originally a system of rules dictated by reason and convenience and accepted by the Christian nations of Europe for the regulation of their relations with each other, and that these nations, and these alone, constituted the community of nations created by the assumption of such obligations toward each other; that this community or family of nations was first enlarged to include Christian states which had grown up outside of Europe, consisting chiefly of the American states which had their origin in European colonization; that it was not until the Treaty of Paris of 1856 that any non-Christian state was admitted to the international family by the agreement of the great European Powers admitting Turkey "to participate in the advantages of public law and of the European concert." The criterion of inclusion or exclusion was not at any time in reality religious. It rested upon the question whether a given state had the degree or character of civilization necessary to enable its government and its people in every respect to understand and comply with the rules of international law as those rules had been developed in the family of Christian nations. It is plain that inability in this respect might result either from a low degree of civilization or from a different kind of civilization with different modes of thought and conceptions of right conduct.

Accordingly Japan, for about forty years after she was open to intercourse with the western peoples, was not admitted to the family of nations, but the amazing facility with which she acquired an understanding of western ideas and adapted herself to the methods of what we, in the West, consider progress, led to her admission to full companionship under the law about twenty-five years ago, and she then became bound to obey and entitled to assert the rules of international law, to control her intercourse with other members of the family.

It is difficult to determine just how far China, Persia, Siam and some other states, having a civilization quite different from that of Europe and America, have been admitted to the family of the nations who are entitled to the benefits and subject to the obligations of international law. Certainly China was not admitted to that circle during the early years when the conditions were created out of which the present difficulties have arisen. She was not then in a condition to comply with and probably her people

were in many respects wholly unable to understand the rules of international law. The reciprocal obligation which those rules involved could not exist and China, being unable to comply with the obligations of that law on her own part, had no right to insist upon the obligation against others. Her right was the moral right to be treated fairly and decently and her obligation was a moral obligation to treat others in the same way. It is also clear that a continuance of the same inability to perform international obligations has down to the present time prevented the full admission of China to the circle of states governed by international law, notwithstanding her inclusion in international conferences and regular diplomatic intercourse.

The customary method for regulating intercourse between the peoples who are subject to international law and the peoples who are not subject to that law has long been to provide conventionally for such regulations as are absolutely necessary. The most striking of these arrangements is the establishment of extraterritorial jurisdiction under which the citizens of the outside Power are withdrawn from the jurisdiction of local tribunals and are entitled to have their rights tried by officials of their own country, primarily by the consuls of their own country. This was the case in Turkey and it continued under the capitulations until the war of 1914. That kind of jurisdiction was provided for by our treaty of 1854 with Japan and generally in the treaties between Japan and the other civilized Powers, and it continued until the year 1894. It was provided for by our treaty of 1844 with China and still continues. We have created for the exercise of that jurisdiction in place of the consuls, the American court in China, a great and excellent court, which performs its duties most creditably. Similar treaties were made with China by the other western Powers.

As a natural corollary to this assent to the right of the foreign nation to protect its own nationals by the action of its own officers, there is a general recognition of the special applicability to the country in which the extraterritorial jurisdiction is exercised of the rule under which outside countries may land troops in disturbed regions for the protection of their own nationals. That rule cannot be stated better than it was by Mr. Hill, in a letter by him as the Assistant Secretary of State, September 11, 1900. He says:

Although in this reply it was convenient to limit the memorandum to the occasion of landing at a treaty port, it was not designed to forego the right, which this government has always held and which on occasion it has exercised in China and in other countries, to land forces and adopt all necessary measures to protect the life and property of our citizens whenever menaced by lawless acts which the general or local authority is unwilling or impotent to prevent.

The most striking illustration of the application of this rule to China was in the Pekin expedition for the rescue of the legations from the Boxers in the year 1900.

A third subject which has been customarily regulated by treaty in such

countries has been trade. Ordinarily there has been first a refusal to permit trade, finally overcome by the pressure of the outside nations and yielded with an agreement limiting the places where trade could be carried on, and expressly stipulating what customs duties should be imposed. We made such a treaty with China in 1844 and there are outstanding some fifteen or sixteen such treaties. That with Great Britain was made eighty years ago, in 1842.

A similar trade agreement involving stipulated tariff rates was included in our treaty of 1854 with Japan.

The door having thus been opened in China, it was inevitable that individual enterprise should press on to secure opportunities for profitable development of the great wealth of that vast country. As there was no law in China to regulate such development, it naturally took the form of pressure for special concessions, and naturally the governments of the seekers for concessions backed up their citizens. After the war of 1895 between China and Japan had revealed the national weakness and governmental incapacity of China, the activity in seeking profitable concessions increased greatly, and there was much favoritism and corruption, much betrayal of the true interests of China on the part of her own officials, and much jealousy and ill-feeling between the competitors for concessions and between their respective governments. It seemed as if China was in a fair way to be torn to pieces and divided between the contending Powers. In 1899 Mr. Hay undertook to put a stop to this process by his famous declaration of the "open door" policy, supplemented in 1900 by a declaration in favor of the preservation of China's territorial and administrative integrity. To these he secured the assent of all the great Powers and they did doubtless retard the process. With the lapse of years, however, the rather informal assents of the Powers to these declarations came to be treated more and more as polite assurances rather than as binding obligations, and the danger in both its aspects, danger to China and danger to peace between the outside Powers, again became threatening. It was that double danger with which the Conference had to deal before the Four Power Treaty could be regarded as permanent and the naval treaty could be concluded.

In the meantime the Chinese revolution of 1911 had overthrown the Manchurian dynasty and great numbers of the Chinese people, under the leadership of the younger generation, many of whom had been educated in the western countries and in Japan, had been making heroic efforts to establish a competent and stable government. They were still in the stress of turmoil and conflict. The country was divided into separate groups of provinces under the control of local military chieftains, maintaining their own separate armies and frequently engaged in conflict with each other. The Peking government had but little power and was quite unable to enforce its authority or make good its agreements throughout the greater part of the country.

Under the conventional arrangements with China there had developed a vast extent of beneficial trade and industry upon which multitudes of people in and out of China were dependent. It was evident that to attempt then to wipe out all the arrangements which I have described and put China immediately upon the footing of a full member of the society of nations unhampered in her trade, her administration and her maintenance of order, except by the rules of international law, would be futile and disastrous for there was no government in China competent to maintain trade, to administer justice to foreigners or to protect foreign life and property. It was evident too that China must work out her own salvation, that no exercise of foreign power could accomplish the result. Four hundred and thirty million people are too great a mass to be reformed from the outside. If China is to possess her own territory with independence and control of her own destinies, she must learn to govern herself and to assert and maintain her own rights as a nation.

Accordingly, the members of the Conference addressed themselves to the task of helping China so far as it was possible in her struggle to achieve self-government. They based their action upon a formal and unanimous agreement

(1) To respect the sovereignty, the independence, and the territorial and administrative integrity of China;

(2) To provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable government;

(3) To use their influence for the purpose of effectually establishing and maintaining the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China;

(4) To refrain from taking advantage of conditions in China in order to seek special rights or privileges which would abridge the rights of subjects or citizens of friendly states, and from countenancing action inimical to the security of such states.

The first of these propositions stated the great objective of an independent China under international law. The second pointed out the way for the full attainment of that objective. The third reaffirmed the principle of the open door, and the fourth contained a self-denying ordinance to keep within bounds the competition of the assenting states.

Having adopted these rules of conduct, the Conference proceeded in a painstaking way to apply them to a succession of concrete cases. Any one examining the treaties and resolutions will find that they uniformly sought a double object, first, to relieve the limitations and inconveniences flowing from the old conventional relations as far as was then practicable under the existing governmental conditions in China, and second, to afford to all sections and parties of the Chinese people a helpful incentive to unite in the establishment of an effective and stable government by making specific provisions under which such a government, competent to perform its

national duties, will be the means of bringing China into the full possession of the rights and liberties assured by international law to the members of the family of nations, just as Japan has been brought into that family.

Personally I am a believer in the coming of that event. It will be a long difficult process, for it requires the new education of more than four hundred million people, but I look to the future of that industrious, kindly, peaceable people, with their inveterate respect for individual and family rights, not as a yellow peril, but as a great reinforcement to the power of ordered liberty upon the domination of which the future of our civilization depends.

The Conference treaty relating to submarines, which is in the way of being described as the Declaration of Washington, was also an incident to the naval armament negotiation.

After an understanding had been reached about the respective proportions of capital ships of the five Powers, a difference developed as to the construction of submarines. Great Britain, which had suffered more than any other Power from the unrestricted destruction of commerce by submarines during the World War, proposed that all submarine construction be prohibited, basing the proposal upon the assertion that the only really important function of the submarine was as a commerce destroyer. This proposal was opposed by Powers regarding the submarine as a useful and comparatively inexpensive instrument for coast defense against naval attack. Everyone in the Conference condemned the use of the submarine for the destruction of commerce as it was used by the Germans during the war, and everyone in the Conference assented to the propriety of using submarines for naval defense. The question was whether one view should lead to prohibition or the other should lead to permission. The submarine treaty was an attempt, coming strictly within the province of a conference for the limitation of armament, to reconcile the practical results of these two divergent views by permitting the construction of submarines and preventing their abuse in a way which it is hoped may prove effective.

The way in which the treaty sought to make such a prohibition effective was—First: By declaring as clearly and definitely as possible the most important rules of existing law for the protection of innocent life and property at sea, through limiting the rights of warships in their treatment of vessels of commerce; Second: By an unequivocal declaration that belligerent submarines are not under any circumstances exempt from these universal rules and that if a submarine cannot capture a merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and to permit the merchant vessel to proceed unmolested; Third: By denouncing a breach of any of these rules as a violation of the laws of war and declaring the offender liable to trial and punishment as if for an act of piracy before the civil or military authorities of any Power within the jurisdiction of which he may be found.

It will be perceived that up to this point the treaty does not undertake to make or provide for making new universal or general international law. It does four things:

It furnishes the high authority of the five great naval Powers of the world as to what the existing law is, at the same time inviting all other Powers to add to that authority by their assent.

It binds all of these five great Powers themselves to obey this law.

It establishes jurisdiction for the trial and punishment of all future violations of this law.

It classifies violations of this law with piracy.

Recall the controversy waged in Germany in the year 1916 over the question whether Germany should engage in unrestricted submarine warfare against commerce. There were two parties on opposite sides of the question and the issue for a long time appeared doubtful. The argument which apparently won the day was that such warfare was not prohibited because the rules of international law regarding visit and search and seizure were made when there were no submarines and that as submarines could not work effectually under those rules, the rules were not to be deemed applicable to them, so that unrestricted submarine warfare against commerce was no violation of international law. The general judgment of the civilized world was that the rules for the protection of innocent lives were wholly independent of the description of vessels which might undertake to regulate commerce and that no belligerent could avoid such rules by constructing ships which could not conveniently obey them. It seems highly probable that if that general judgment had been formally registered and declared before 1916, as it has been in this treaty, the decision about unlimited submarine warfare against commerce would have been the other way in Germany and the terrible destruction caused by that warfare would have been avoided.

Recall also the situation which existed after the Armistice when people were crying "Hang the Kaiser" and when the Allied countries were confronted with the fact that they could not punish the atrocious crimes committed by German officers on land and sea during the course of the war, under any jurisdiction existing at the time the offenses were committed; that is to say, they could not punish lawless violence except by lawless violence.

What I have called the third step in this treaty, the jurisdictional provision for punishment, falls in the same class of national action by international agreement as the punishment of piracy, the prevention of slave trade and the exercise of the authority vested in Congress by the Constitution of the United States (Article 1, Section 8)—"To define and punish piracies and felonies committed on the high seas and offenses against the law of Nations." The offense to be punished is against the law of nations. The sovereign authority which proposes to punish is national. The right

to exercise that authority depends upon jurisdiction of the person. The place of the offense is immaterial because international law is a part of the law of the country asserting jurisdiction and is not confined to the limits of that country's own territory but extends over all the seas. The liability for these violations of international law cannot be excused by pleading the order of a superior. This is quite in accordance with the view taken by the Supreme Court of the United States that no official order of a superior officer can be superior to the law or can relieve the master of a vessel from liability for violating the law.

Perhaps this provision agreed upon by so great authority in the world may be the beginning of a system under which in general those rules of international law which express the moral sense of mankind may receive a new sanction through responsibility to law and liability to punishment of the agents through whom the rules may be violated.

It will be observed that the statement in this treaty of the rules relating to visit and search and seizure does not undertake to state all the rules of international law upon that subject. It was not intended to state all such rules. It was not intended to be a codification of international law relating to visit and search and seizure. The purpose was to state only the most important rules for the protection of innocent life so briefly and simply that every intelligent person could understand them, and to refrain from confusing the unscientific mind by the introduction of the less important details. This was required by the main consideration upon which the treaty relies for its effectiveness. The treaty is not merely a declaration of existing law. It is not merely an agreement between governments resulting from diplomatic negotiation. It is all these, but above all, it is an appeal to the public opinion of mankind to establish and maintain a fundamental rule of morals applied to international conduct in the form of a rule of international law.

We are all familiar with the assertion that international law is not really law because it has no sanction. That is only a half-truth and therefore misleading. The real sanction of international law comes from the punishing power of public opinion, a power which has been growing with great rapidity in recent years and bids fair to grow still more rapidly with the increased public participation in the conduct of foreign affairs and the constantly increasing interdependence of nations. The ordinary mode of its exercise is in control of the operations of government. The most absolutely simple exercise of it is illustrated by the effectiveness of the Chinese boycott which avails itself of no governmental action whatever. This tremendous and increasing power is not very effective as yet in support of mere governmental agreements as such, and it is not very effective in matters which are complicated and confused, which rest upon conflicting evidence and argument; but where a rule of international law is simple, easily understood and applies the moral sense of decent people the world over to human

conduct, public opinion is competent to enforce that rule with tremendous effect. The advantage of having the moral sense about a particular course of conduct crystallized into a rule of law, is that it takes the subject out of the field of controversy and leaves opinion free from uncertainty. I have no doubt that the provision of this treaty which serves to put such acts as the sinking of the *Lusitania* in the same class as piracy correctly registers and formally declares the deliberate opinion of the civilized world outside of Germany and of many people in Germany, and that this formal solemn declaration of the criminal quality of the act will very greatly decrease the probability of its repetition by any nation hereafter because it will present the practical certainty of universal public condemnation which no nation can afford to incur.

This treaty takes one further step, and that is to simplify still further the whole subject by proposing a new rule of absolute prohibition against the use of submarines as commerce destroyers, and all five of the great Powers uniting in the treaty voluntarily subject themselves to the operation of that rule and at the same time ask other Powers to join them in that new rule by adhering to the treaty. This, of course, is the first step in making a new rule of international law. It follows closely the method adopted by the Powers joining in the Declaration of Paris in 1856 and in the Alabama Treaty of Washington in 1871. In that treaty of 1871, after stating the three rules regarding the duty of neutrals, to which Great Britain and the United States bound themselves, they proceed to provide for requesting the adherence of other Powers. The effect of this adoption of these three rules regarding the rights and duties of neutrals, although by only two Powers, is apparent in the subsequent conventions which have been building up international law since 1871. I think a similar effect may be anticipated from the declaration of this new rule regarding submarines by the five Powers of the Washington Conference of 1921.

Similar considerations apply to the provision of the treaty under consideration prohibiting the use of poisonous gases. That prohibition, which puts the use of poisonous gases and chemicals in the same class with the poisoning of wells, carries on in more definite and universal form a declaration contained in Article 171 of the Treaty of Versailles. That declaration was in these words:

The use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany.

This was one of the articles which was adopted by the United States in its subsequent treaties with Germany and with Austria and with Hungary, with the result that some thirty-five Powers had united in declaring that such a prohibition existed, although the article itself went no further than to impose the prohibition specifically upon Germany. The present

treaty goes a step farther and gives definite form to the general prohibition and invites all civilized Powers to adhere.

It will be seen from what I have said that while the Washington Conference had no concern with the making of international law, it did naturally and effectively, as incidental to giving effect to its policy of limiting armament, take quite important steps in the direction of developing and strengthening international law.

It took one further step by resolution providing for the appointment of a commission to consider and report upon the condition and requirements of international law affecting the other new agencies of warfare which have produced so startling an effect upon military and naval conflicts.

The time has not yet come when international affairs are sufficiently settled to make immediately practicable a general conference to consider, clarify, extend and strengthen the law of nations, but it is already high time for those who believe in a world controlled by law, to begin their preparation for such a conference, and the Washington Conference on Limitation of Armament, as a by-product of its own special work, has contributed materially towards that preparation.

The PRESIDENT. I have the pleasure of introducing to you now, to speak upon "The Limitation of Armament by the Conference of Washington," Rear Admiral Harry S. Knapp, of the American Navy.

ADMIRAL HARRY S. KNAPP. Mr. President, fellow members, ladies and gentlemen: You will expect from me a strictly professional analysis of, and comments on, the treaty for the limitation of armaments, which I shall endeavor to give you.

THE LIMITATION OF ARMAMENT AT THE CONFERENCE OF WASHINGTON

ADDRESS BY REAR ADMIRAL HARRY S. KNAPP

U. S. Navy, Retired

The limitation of land armaments may be dismissed with a word, no such limitation having resulted from the Conference, except in one small particular—that of retaining the *status quo* in insular coast defenses, contained in Article XIX of the treaty "limiting *naval* armament." A good reason for the failure to limit land armaments existed from the first in the fact that Russia and Poland, having two of the largest armies of the world, were not represented. Premier Briand's speech gave the *coup de grace* to any hope of action at Washington. In what follows, therefore, the discussion will be confined to naval armaments.

Naval strength is always comparative with that of other naval nations. It is frankly from this restricted viewpoint—the comparative military posi-